Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

LOUIS CANTOR,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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60pp

QUESTION PRESENTED

There is a fundamental difference between the Sixth and Second Circuits as to the extent Congress conveyed federal jurisdiction over local governments under 18 U.S.C. §666(c). In United States v. Mills, 140 F3d 630, 1998, the Sixth Circuit determined that under the §666(c) exception federal criminal jurisdiction does not extend to bribes in connection with transactions involving bona fide compensation paid by federally funded local governments. The Second Circuit, in the instant case, determined that §666 extended federal jurisdiction to such bribes unless the transaction involved is under $5,000 pursuant to 666(a). The Second Circuit improperly limits the application of §666(c) to the minimum valuation requirements of §666(a) contrary to both the broad wording of the legislation and the decision of the Sixth Circuit.

Thus, a clear conflict exists between the two Circuits as to the meaning of §666(c), which requires resolution.

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The unpublished order of the United States Court of Appeals affirming the denial of petitioner's 18 U.S.C. §2255 petition annexed hereto as Appendix A.

The Memorandum Endorsement of the United States District Court for the Southern District of New York denying petitioner's 18 U.S.C. §2255 application but issuing a certificate of appealability, annexed hereto as Appendix B.

The Supreme Court denial of plaintiff's prior petition for a writ of certiorari, annexed hereto as Appendix C.

The unpublished order of the United States Court of Appeals for the Second Circuit affirming petitioner's conviction is reported as United States v. Cantor, No. 96-1693, 1990 WL 748 52, 1998 U.S. App. LEXIS 2725 (2d Cir., Feb. 20, 1998) annexed hereto as Appendix D.

The sentencing Memorandum of the United States District Court for the Southern District of New York, annexed hereto as Exhibit E.

JURISDICTION

The Order of the Court of Appeals sought to be reviewed was entered on February 18, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 (1).

THE STATUTE INVOLVED

The sole statute involved is 18 U.S.C. §666, which extends federal criminal jurisdiction to local organizations governments or agencies receiving $10,000 or more of federal funds in a given year, and relevantly provides:

> (a) Whoever...
>
> • • •
>
> (2) corruptly gives, offers or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or a State, local or Indian tribal government, or an agency thereof, in connection with any business, transaction, or series of transaction of such organization, government, or agency involving anything of value of $5,000 or more.
>
> • • •
>
> (c) *This section does not apply to bona fide* salary, wages, fees, or other *compensation paid*, or expenses paid or reimbursed, in *the usual course of business*. (emphasis supplied)

[see Appendix F]

STATEMENT OF THE CASE

Petitioner, Louis Cantor, an attorney representing school construction clients was convicted of three counts of bribery and three corresponding counts of conspiracy for aiding and abetting his clients in paying bribes in excess of $5,000 to Sheldon Rosenblum, Deputy General Counsel of the New York City Board of Education ("BOE"), a federally funded agency. However, as found by the district court, Rosenblum had extorted the bribes by threatening to prevent payment of long overdue contract balances concededly due petitioner's clients on long completed school construction contracts.

The BOE had avoided payment of these contract balances by failing to perform a contract precondition requiring it to make a final audit of extras and credits to the contract price. Finally, Rosenblum was put in charge of establishing an independent audit committee to perform the audit on petitioner's clients contracts. He not only refused to do so unless paid a bribe, but threatened to delay any legal action the clients might bring for at least five years, so that petitioner's 89 and 85 year old clients would probably never see the money to which they were legitimately due.

As the district court found, Rosenblum's threats were powerful and compelling and petitioner's clients complied. The moneys paid, after unilateral audit by the BOE, were recompense for works performed to which the clients were, as the district court held, legitimately entitled.

The District court stated:

> "Rosenblum understood. He was extorting the bribes. There was testimony he pleaded guilty to extortion. Under New York's penal code, Section

> 200.5, it is a defense to bribery prosecution that the corrupt public servant obtained the bribe by means of extortion." (Appendix E, at E18)

The district court also appended to the judgment its handwritten statement that

> "Purpose of the bribes was to obtain payments to which payor was legally entitled, defendant neither paid or shared in the benefits of the bribes, and the bribes were extorted by the corrupt official" (Appendix F, at F8)

Yet, despite its finding, and the government's concession at trial, that petitioner's clients were legitimately entitled to the compensation they received after paying the bribes, the district court rejected petitioner's argument that the subsection (c) exception applied.

In affirming the judgment of conviction in February, 1998, the Second Circuit did not discuss subsection (c). It relegated certain arguments made on behalf of petitioner to a general finding that these arguments were without merit without including the bona fide compensation argument in that category. (Appendix D, at D6)

In March, 1998, one month after the Second Circuit's affirmance of petitioner's conviction, the Sixth Circuit decided United States v. Mills, 140 F3d 630, holding that the 666(c) exception precluded federal jurisdiction where bribery was involved, so long as bona fide compensation was paid by the federally funded government to the bribe givers. The Sixth Circuit held that the clear language of subsection (c) encompassed bona fide compensation received by the bribe givers.

However, petitioners had already applied for a writ of certiorari to the this Court. The Mills decision was first brought up by petitioner in his reply brief. At that time, the Mills decision was the only one directly on point with respect to 666(c) since the Second Circuit's decision had not specifically addressed this statutory exception. This Court denied the petition for a writ of certiorari on October 5, 1998. (Appendix C)

Citing Mills as an intervening decision changing the law, petitioner next asked the district court, pursuant to 28 U.S.C. 2255, to overturn his conviction. On July 27, 1999, the district court denied petitioner's 2255 application. It held that Mills did not constitute a change in the law of the Second Circuit, and that it was bound by that Court's affirmance of the conviction. It also suggested that the Mills decision was solely based on the application of the $5,000 minimum valuation exception of 666(a).

Nevertheless, the district court issued a certificate of appealability allowing petitioner

> "to argue to the Court of Appeals that Mills correctly excepts from consideration, as 'compensation' under 18 U.S.C. 666(c), the earned payments to which his clients were legitimately entitled" (Appendix B, at B1-2)

On appeal, the Second Circuit, on February 18, 2000, issued an unpublished Summary Order affirming the district court's denial of petitioner's §§2255 application. The Second Circuit held petitioner's reliance on the Mills decision was without merit for three reasons: (1) that issues decided on direct appeal may not be religated; (2) that Mills was not an intervening change in the law and "is not binding on this Court", and (3) that Mills only held that the subsection (c) exception

> "...should be applied to all statutory minimum valuation requirements of §666(a)...Nowhere did the court imply, as Cantor urges, that §666 was inapplicable because the salaries exchanged for the bribes were bona fide under §666(c)" (Appendix A, at A4)

Mills did not "imply" but flat out held that where bona fide compensation is paid, the bribes paid by those receiving the compensation are excepted from federal jurisdiction under the subsection (c) exception.

Mills also held that the $5,000 threshold limitation of §666(a) was not met, but held this was because the salaries paid the bribe givers could not be used as a threshold valuation since they were covered by the bona fide compensation exception (140 F3d at 633). But, contrary to the interpretation of the Second Circuit, Mills did not restrict subsection (c) to a limitation on the scope of the subsection (a) threshold exception. Mills held that separate and apart from the threshold exception, §666(c) itself barred federal prosecution, there being no allegation that the compensation was not justly and honestly earned in the normal course of business. Thus, the bona fide compensation exception prevailed despite the payment of bribes, which were left to state not federal prosecution.

Thus, a clear conflict exists between the Sixth and Second Circuits on the application of subsection (c) where the transaction for which the bribes were given involves payment of bona fide compensation. In such case, the Sixth Circuit holds that the federal statute does not apply, leaving bribery prosecution to state courts; whereas, at bar, the Second Circuit, without reference to, or analysis of, the clear, contrary wording of the exception, holds

federal jurisdiction applicable even though payment of bona fide compensation is conceded.

It is respectfully submitted that the conflicted interpretations of §666(c) be resolved by this Court to determine the Congressional limitations on federal jurisdiction over local government imposed by that exception. Surely, that limitation encompassed extortion by a government official in refusing payment of concededly overdue bona fide compensation due for work performed.

REASONS FOR GRANTING THE WRIT

18 U.S.C. §666 expressly excludes from its coverage, under subsection (c), any instance where bona fide salary, wages, fees, or other compensation is paid in the usual course of business.

The Sixth and Second Circuits have made diametrically opposite holdings in cases involving bona fide compensation paid by a federally funded government or agency to recipients who paid bribes in connection with the transaction involved. In both cases the compensation paid to the bribe givers was indisputably, and at bar, concededly, proper recompense for work performed. Additionally, at bar, the bribes were extorted.

In United States v. Mills, 140 F3d 630, bribes of less than $5,000 were paid to sheriffs selling unfilled deputy sheriff positions. However having thereby obtained the positions, the bribe payers performed the required deputy sheriff work, and earned their salaries. Mills, who sold the positions, was prosecuted, inter alia for bribery under §666 (a)(1)(B). The district court dismissed the bribery counts because the minimum $5,000 threshold valuation, had not been met.

On appeal, the Sixth Circuit reviewed the case de novo. It found the subsection (c) exception to be at the heart of the controversy. Analyzing the subsection, it found its clear and broad wording encompassed "...bona fide salaries, wages, fees and other compensation either *received by* or *promised by* §666 defendants..." (140 F3d at 633).

Thus, both payments by the funded government or agency as well as promises of obtaining bona fide compensation came within the subsection (c) exception. Mills further held that since bona fide compensation came within the §666(c) exception it could not be used in connection with the §666(a) threshold exception. Further, since the salaries were bona fide, earned in the usual course of business, there was no basis for federal jurisdiction since the basic transaction was exempted under the wording of subsection(c).

Most pertinently, the Sixth Circuit held that Congress had made two exceptions to federal bribery jurisdiction under §666, which did not merit the attention of the federal courts and were best left to state judicial systems. The first exception was the monetary thresholds set forth in §666 (a).

The second exception to §666 was the bona fide compensation exception of §666(c), the Court stating:

> "Congress also saw fit to exclude from the reach of the federal statute those individuals and those transactions that involved only the payment of bona fide salaries, wages, fees and other compensation..." (Id at 634)

Thus, the Sixth Circuit held that both the $5,000 threshold limitation and the bona fide compensation exception were separate

and distinct bases for precluding federal prosecution in Mills. Contrary to the Second Circuit's statement that Mills only applied the bona fide compensation exception to all statutory minimum valuation requirements of §666(a), Mills explicitly held that the subsection (c) exception was an independent basis for precluding §666 where bona fide compensation was received by the bribe givers from the funded government. It held that the compensation paid the deputy sheriffs was legitimate, and "*(c)onsequently for that reason*" (emphasis supplied) as well as for the $5,000 threshold limitation, the Mills bribery charges should be dismissed. (Id, at 634) Moreover, it based its minimum valuation finding on the fact that salaries where bona fide, came within the subsection (c) exception, and could not be applied to the separate subsection (a) threshold exception.

In affirming the §2255 decision of the district court herein, the Second Circuit gave no explanation as to why the clear wording of subsection (c) should not apply to the conceded payment of bona fide compensation as recompense for work performed. The Second Circuit's interpretation of the Mills decision, not only renders the subsection (c) exception bereft of meaning as an independent limitation on federal jurisdiction as expressed in the statutory language, but relegates it to no more than a restriction on the scope of the threshold limitations of subsection (a). There is absolutely no basis for such an emasculating interpretation of the clear and broad language of §666(c). The Congress therein provided clear wording that section 666 would not apply where bona fide compensation was paid in the normal course of business. It applies to all of §666, including provisions relating to the payment of bribes, not just to the $5,000 threshold limitation. If Congress had meant to so limit the scope of §666(c) it could easily have done so. Clearly, it did not, as the Sixth Circuit so explicitly held.

Thus, the Second Circuit affirmed petitioner's conviction despite transactions concededly involving bona fide compensation payments; whereas the Sixth Circuit's reasoned interpretation of §666(c) would result in dismissal of the federal charges, with prosecution in New York State courts rendered inappropriate since New York's Penal Code, Section 200.5 provides that extortion, found by the district court to have elicited the bribes, is a defense to a bribery charge.

Although the subsection (c) exception was raised by petitioner in its prior petition to this Court for a writ of certiorari (No. 97-1864), at that time the Second Circuit had not, and could not have challenged the later decision of the Sixth Circuit in Mills. Now, under this §2255 application it has, and has come to an opposite conclusion under basically similar facts. It did so by mischaracterizing the ruling of the Sixth Circuit relating to the subsection (c) exception and by avoiding an explanation of why the clear language of §666(c) does not apply to the conceded bona fide compensation paid to petitioner's clients.

Although the Second Circuit did not address the wording of §666(c), the government has offered its own explanations. They are devoid of merit. The government argued that the bona fide compensation exception relates solely to the bribery element, i.e., "compensation" paid to the government agent by the §666 defendant, and not, as found by the Sixth Circuit, to the transactional element, the moneys received by that defendant from the funded government or agency.

However, there is no such limitation in the statutory language, which Congress could easily have included had it so intended. As held by the Sixth Circuit, the wording of §666(c) undoubtedly encompasses bona fide compensation received from the funded government or agency. Additionally, the words "in the

usual course of business" easily relate to the business of that government or agency, herein the building of schools.

Moreover, the government's position is illogical for it necessarily and erroneously assumes that bona fide compensation can be paid to reward a government agent in connection with a transaction involving the government employing that agent. Conversely, if one makes a legitimate, bona fide payment necessarily bereft of intent to reward the agent with respect to any such transaction, then §666 would not apply by its own terms, and subsection (c) would be rendered gratuitous and meaningless, contrary to a basic rule of construction.

The government has also argued that the legislative intent in enacting §666(c) was to prevent §666 from interfering with appropriate business practices and lawful commercial transactions. It is difficult to determine how such generalized concepts relate to the specific wording of the exception. The Sixth Circuit found the wording of §666(c) so clear that there was no need to look beyond the wording of the statute to the intent of the legislature. (Id. At 633)

Furthermore the transactions between petitioner's clients and the BOE were appropriate and legitimate, but were threatened by the extortion plot of the corrupt BOE official. The bona fide compensation exception indicates that Congress would not countenance a public official's improper extortion plot to prevent payments required under such a legitimate transaction. There was no attempt to corrupt a public official, only a response to extortion by a corrupt official.

Therefore, a clear conflict exists between the Sixth and Second Circuits as to statutory interpretation, which, it is respectfully submitted, requires resolution by this Court. If the Sixth

Circuit's interpretation is correct, to uphold the petitioner's conviction for an act the law does not make criminal "inherently results in a miscarriage of justice" (Davis v. United States, 417 U.S. 333, 347.

CONCLUSION

There being a clear conflict between the Sixth and Second Circuits as to the applicability of §666(c) where bona fide compensation is paid bribe givers, interpretation of the statutory exception is required, and the writ of certiorari should be granted.

Respectfully submitted,

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New York, New York
May 16, 2000

APPENDIX A

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals, for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of February , two thousand.

PRESENT:

Hon. John M. Walker, Jr.,
Hon. Robert D. Sack
Hon. Robert A. Katzmann,

Circuit Judges

- -

LOUIS CANTOR,

Petitioner-Appellant,

v.

UNITES STATES OF AMERICA,

Respondent-Appellee.

- -

APPEARING FOR APPELLANT
LOUIS CANTOR, PRO SE
New York, NY

APPEARING FOR APPELLEE
ANDREW S. DEMBER
Assistant United States Attorney for the Southern District of New York (Baruch Weiss, Assistant United States Attorney, and Mary Jo White, United States Attorney, on the brief)
New York, NY

Appeal from the United States District Court for the Southern District of New York (Stanton, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is **AFFIRMED.**

Petitioner-Appellant Louis Cantor appeals from a July 27, 1999 decision of the Southern District of New York (Stanton, J.) Denying his petition for a writ of habeas corpus. The district court granted a certificate of appealability, and this

appeal followed. Cantor was convicted on May 13, 1996 of, inter alia, bribing officials of the New York City Board of Education ("BOE") in violation of 18 U.S.C. §§ 371 and 666. Cantor, a lawyer at the time, made payments to the officials in order to facilitate "retainage" payments that the BOE owed his clients.

Cantor argues on appeal that his conviction should be reversed under a provision of the bribery statute that excepts "bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. § 666(c). In support of this contention, he cites a case from the Sixth Circuit that was decided after his conviction. See United States v. Mills, 140 F.3d 630 (6th Cir. 1998), The Mills court noted that "bona fide salaries, wages, fees, and other compensation either received by or promised by § 666 defendants fall within the scope of the subsection (c) exception." Id. At 633. Based on this statement, Cantor argues that "bribes paid by those receiving legitimate payments for work performed, herein conceded, are excluded from coverage by virtue of the limitation set forth under the clear intent of subsection (c)."

This argument is without merit. First, it is well-established that issues decided on direct appeal may not be relitigated in the context of a petition under § 2255. See United States v. Perez, 129 F.3d 255, 260 (2d Cir. 1998), cert denied, 119 S.Ct. 384 (1998). Cantor raised the § 666(c) argument on direct appeal, and we necessarily considered it when we affirmed his conviction. See United States v. Cantor, 141 F.3d 1152, 1988 WL 74852 (2d Cir. 1998). Second, although there is an exception to the rule against relitigation for an "intervening change of law," United States v. Jones, 918 F.2d 9, 11 (2d Cir.

1990), Cantor cannot invoke it because Mills is not binding on this court.

Third, even if we were to consider Mills, we would find that it does not control here. That case held only that the § 666(c) bona fide compensation exception should be applied to all statutory minimum valuation requirements of § 666(a). In that case, payments were made to public officials to secure deputy sheriff positions. The court held only that because the salaries of these positions were bona fide under § 666(c), they could not be considered in determining whether the $5,000 minimum transaction requirement of § 666(c) had been satisfied. The court thus looked solely to the value of the bribes, which was less than $5,000. See id. At 632-33. Nowhere did the court imply, as Cantor urges, that bribes were bona fide under § 666(c). If the bribes themselves had been worth more than $5,000, we have no doubt that Mills's conviction would have been affirmed. Here, the bribes involved totaled over $28,000 even without considering the allegedly bona fide payments to Cantor's clients. Therefore Cantor cannot argue that Mills exonerates him.

For these reasons, the district court's denial of Cantor's § 2255 petition is affirmed.

FOR THE COURT
KAREN GREVE, Acting Clerk
By:

/s/
RALPH A. ANDERSON, Deputy Clerk
ACTING OPERATIONS MANAGER

APPENDIX B

MEMORANDUM ENDORSEMENT

Louis Cantor v. United States of America, 99 Civ. 783 (LLS), 94 Cr. 465 (LLS)

Cantor claims that United States v. Mills, 140 F.3d 630 (6th Cir. 1998) which was decided about a month after the affirmance of Cantor's conviction, is an intervening change in the law which excepts him from the rule that "section 2255 may not be employed to relitigate questions which were raised and considered on direct appeal." Barton v. United States, 791 F.2d 265 (2d Cir. 1986).

A decision of the Sixth Circuit is not a change in the law of the Second Circuit, whose unpublished memorandum affirmance of Cantor's conviction on direct appeal, 141 F.3d 1152 (2d Cir. 1998), 1998 WL 74852, binds this court.

Further, it is doubtful whether Mills helps Cantor much. In Mills, the courts took the amount of the bribes as the measure of the value of the jobs for which the bribes were paid; since that was less than the statutory floor of $5,000, dismissal of the indictment was upheld. Here, both the amounts of the bribes and the amounts of the payments to the bribers (to which they were entitled) far exceeded $5,000.

The petition is denied.

A certificate of appealability will issue to allow Mr. Cantor to argue to the Court of Appeals that Mills correctly excepts from consideration, as "compensation" under 18

U.S.C. § 666(c), the earned payments to which his clients were legitimately entitled.

So ordered.

Dated: New York, New York
July 27, 1999

/s/
LOUIS L. STANTON
U.S.D.J.

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20542

October 5, 1998

Mr. Richard A. Greenberg
Newman, Schwartz & Greenberg
950 Third Avenue
New York, NY 10022

Re: Louis Cantor
v. United States
No. 97-1864

Dear Mr. Greenberg:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/

William K. Suter, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of February, one thousand nine hundred and ninety-eight.

PRESENT: HON. JOHN M. WALKER, Jr.,
HON. GUIDO CALABRESI,
HON. DONALD P. LAY,*
Circuit Judges.

UNITED STATES OF AMERICA, *Appellee*,

v.

SUMMARY ORDER
96-1693

LOUIS CANTOR, *Defendant-Appellant*.

---

*. The Honorable Donald P. Lay, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appearing For Appellant: RICHARD A. GREENBERG,
New York, NY.

Appearing For Appellee: ANDREW S. DEMBER,
Assistant United States Attorney,
New York, NY.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Louis L. Stanton, *Judge*) and was argued.

UPON CONSIDERATION WHEREOF, it is ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Appellant, an attorney, was convicted on various counts for bribing and conspiracy to bribe an official of a state agency that receives federal funds. *See* 18 U.S.C. §§371, 666. He recommended and arranged to have his clients in the construction industry bribe Sheldon Rosenblum, the Chief of the Commercial Division in the Office of Legal Services at the New York City Board of Education ("BOE"), in order to expedite the disbursement of "retainage" payments owed to them by the BOE.[1] Appellant raises several objections to his conviction; none have merit.

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1. The practice of the BOE was to hold back a percentage of the amount due on construction contracts as "retainage." This amount was not to be paid until completion of the project to the BOE's satisfaction. Illegal withholding of retainage payments by the BOE was apparently widespread. Appellant was convicted in a "sting" operation that was cracking down on corruption within the BOE.

First, appellant contends that the bribes that involved the School Construction Authority ("SCA")[2] – the "Caristo" counts – are not covered by §666 because that entity, unlike the BOE, does not directly receive federal assistance.[3] The government responds that all the contracts that were originally made with the BOE (and later transferred to the SCA when that entity was created) "remain" contracts of the BOE. We need not, however, resolve the question of whether *all* such contracts continued to be contracts of the BOE, or whether some became new contracts with the new agency. For our purposes, we only need to look at the specific terms of the agreement involved in the Caristo bribes: Under that agreement, the BOE remained the named party on the contract, and, if Caristo could not prove his entitlement to the retainage, it was the BOE that would get the money in dispute. It follows that the Caristo contracts did remain, at least to some extent, the "business" of the BOE, *see* 18 U.S.C. §666(a)(2), and therefore, that the bribes – made to the BOE's attorney (Rosenblum) – concerned an entity that directly receives federal funds.

The next argument is that the government, while it clearly showed that the bribes involved $5,000 or more (as required by §666), failed to prove that this was the value of the transaction from the perspective of the state agency that

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2. In 1988, the state legislature created the SCA to oversee the construction and renovation of schools. Some, but apparently not all, of the BOE's existing construction contracts (and associated funds) were transferred to the SCA at that time.

3. The argument that the BOE itself is not a qualifying agency under §666 is frivolous.

received the federal funding. And the law of our circuit requires that the value involved be viewed from the standpoint of the affected agency. *See United States v. Foley*, 73 F.3d 484, 488-92 (2d Cir.1996). Despite appellant's earnest arguments, the *Foley* requirement has easily been met, and appellant's contentions to the contrary are all without merit.[4]

More plausible is a further argument based on *Foley* – that the government failed to *allege* that the bribe involved $5,000 from the perspective of the agency. This omission, appellant asserts, constituted a fatal failure to indict on a material element of the offense. In the end, this contention also fails.

It is well settled that "[a]n indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir.1992). Appellant's argument is that because the perspective of the bribe's valuation is characterized as being an implicit but "material" element of the offense in *Foley*, *see* 73 F.3d at 488, the failure of the indictment to mention this specific point is reversible error. But *Foley* was decided on the ground that the government failed to meet its burden of proof at trial on this issue, and it is by no means clear whether the court's comments on indictments are part of (or, indeed, could be part of) its holding.

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4. For example, appellant's assertion that the BOE's "unjustified" interest in retaining the funds precludes it from attaching *any* pecuniary value to those funds is fanciful.

We need not resolve this issue, however, because appellant did not challenge the alleged defect in the indictment at his trial, and, as a result, did not preserve this matter for appellate review. *See, e.g., United States v. Gironda*, 758 F.2d 1201, 1210 (7th Cir.1985) ("[A]n indictment not challenged before trial will be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted.") (internal quotation marks and citations omitted). This rule makes sense because it prevents defendants from holding faulty indictments as aces up their sleeves, to be played only in the event of guilty verdicts. The indictment before us closely followed the statutory language of §666. Under the circumstances, we cannot say that the indictment's omission of the agency-perspective element with respect to the $5,000 valuation deprived Cantor of fair notice of the crimes against which he would have to defend himself. *See United States v. Silverman*, 430 F.2d 106, 111 ("An indictment must be read to include facts which are necessarily implied by the specific allegations made."), *modified* 439 F.2d 1198 (2d Cir.1970).

The third claim made by appellant is that §666 requires that the bribe directly involve the federal funds received by the state agency, or, in the alternative, if such a requirement does not exist, that §666 violates the Tenth Amendment. The Supreme Court has just rejected this position. *See Salinas v. United States*, 118 S.Ct. 469, 474 (1997).[5] Consequently, so do we.

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5. There is a passage in the Court's opinion that suggests that some nexus between the bribe and the federal funds at stake might be needed. *See Salinas* at 474

(continued...)

Appellant's other principal claims – that the evidence was insufficient to establish that Cantor acted "corruptly" under §666, that the government's investigative techniques violated the Due Process Clause, and that the district court abused its discretion in not suppressing certain evidence – are all without merit.

We have reviewed the full record before us and find no error in the proceedings below. The judgment of the district court is AFFIRMED.

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5. (...continued)
(describing the relationship to federal funds in the case before it as "close enough to satisfy whatever connection the statute might require"). The case before us similarly satisfies whatever connection is mandated. *See United States v. Bonito*, 57 F.3d 167, 172 (2d Cir.1995).

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

v. 94 CR 465 (LLS)

LOUIS CANTOR,

Defendant.
----------x

October 22, 1996
10:00 a.m.

Before:

HON. LOUIS L. STANTON,
District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
SUZANNE JAFFE BLOOM
ANDREW DEMBER
Assistant United States Attorneys

NEWMAN & SCHWARTZ
Attorneys for Defendant
BY: GUSTAVE H. NEWMAN
KARL E. PFLANZ

(Case called)

(In open court)

THE COURT: Good morning. I assume you have been over the presentence report with Mr. Cantor.

MR. NEWMAN: Yes, I have, sir.

THE COURT: I see from the copy that I have that you have various changes you would like to see made. They are fairly extensive. They stem from the fact that the version in the presentence report of the offenses is basically the prosecution version. And to that you have appended basically the defense version.

MR. NEWMAN: That's correct, sir.

THE COURT: It seems to me the thing for me to do is leave it as it is. None of the factual statements recited in the presentence report have anything to do with the case. I tried the case, I have my own impression. I have been over the record thoroughly in the past few days and I do not think any purpose can be served by making specific findings, unless somebody requires something different.

MR. NEWMAN: I don't require any specific findings, Judge.

THE COURT: Then let's turn to the guideline calculation. Since, under the cases, even if a departure is made – and, of course, I am considering a departure, both sides have briefed it fully – it must be made from a defined point. The guideline calculation starts at base level 10, adds

two levels for more than one bribe, adds four levels for a payment of $39,000. That is specifically challenged by the defense, but on that point I rule against them. And those then total level 16. I think that brings us to the issue of whether a two-level reduction should be granted for minimum role.

Does either side wish to add anything to what they have submitted on that issue in writing?

MR. DEMBER: No, your Honor.

MR. NEWMAN: No, your Honor.

THE COURT: Then I will resolve that issue forthwith.

The Sentencing Guidelines Section 3B1.2, application note 3, states: "A minor participant means any participant who is less culpable than most other participants but whose role could not be described as minimal."

This accurately describes Mr. Cantor's role. There is no serious argument that it was minimal; it was not minimal. But he was not the one who paid a bribe. He was not the one for whose benefit the bribes were paid. Those participants who paid the bribes for their benefit were more culpable than he. Canror tried, more or less successfully, at different times, to distance himself from the discussions and payments of the bribes. He made the introductions, but he was a minor participant, not a principal.

Accordingly, I determine that the two-level reduction for minor role should be allowed and the guideline level is level 14, which yields a sentencing range of 15 to 21 months.

With that said, there is the issue of a downward departure.

Mr. Newman, you can proceed as you wish on that, or you may prefer to argue it and have it determined before any more general comments about sentencing or as part of one overall presentation. How would you like to go?

MR NEWMAN: Judge, it's so intertwined in my presentation that I might as well make the presentation, Judge.

THE COURT: Okay. Then before you start, Mr Newman –

Mr. Cantor, let me say to you that if you wish to speak before Mr. Newman speaks, now is your chance. If you want you can wait and speak after he speaks. You do have to say anything at all, it is entirely up to you. But if you want to speak first, then now is the time.

THE DEFENDANT: Thank you, your Honor. I think I put everything I have to say in my letter to you.

THE COURT: All right. Thank you.

I should say for the record that I have received, in addition to the presentence report itself and its various addenda and versions, Mr. Newman's letter of August 27 with Dr. Rubinstein's advice; your sentencing memorandum, Mr. Newman, and the great number of letters appended to it, all of which I have read; the government's letter of October 17, really responding to the defense letter, and its attachment,

dated October 10, from the Bureau of Prisons; and your letter dated October 10, Mr. Cantor.

Is there anything that might be on its way to me that I have not seen?

MR. NEWMAN: No. We had mercy in mind, Judge, and so we prepared no further writings.

THE COURT: Then I think you have the floor, Mr. Newman.

MR. NEWMAN: Judge Stanton, since the advent of the guidelines, we as advocates have all focused on the question of what's the point total, as we just did, what, if any, basis is there for a downward departure. And as advocates we have sometimes lost sight of the basic principle, and that is, your Honor, the statute that actually created the Sentencing Commission, set forth its policy and indicated Congress' attitude toward the sentencing commission and sentencing generally.

I have particular reference, your Honor, to Title 28, Section 994, subdivision 5(j)

THE COURT Title 28?

MR. NEWMAN: Yes, sir.

THE COURT: 18.

MR. NEWMAN: Sir, Title 28, Section 994, the Judiciary and Judicial Procedure Act, Judge, Section 994, subparagraph 5(j).

I take the liberty, your Honor, to read it because I think that is the backdrop against which I want the Court, respectfully, to view Mr Cantor, his prior life, and his conduct in this particular case. And I take the liberty of reading it –

Are you with me, Mr. Dember?

MR. DEMBER: Go ahead.

MR NEWMAN: "The commission shall ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender, has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury."

Obviously, Mr Cantor's crime does not fall into the second category. I'm not demeaning or diminishing the seriousness, but what I'm saying is that the basic principle of nonincarceration for nonviolent first offenders is sometimes lost in our concentration on the guidelines, the boxes in the guidelines, if you will, and the particular delineated sentences in the guidelines.

With that as a backdrop, what I'd like to do is reason with this Court in determining what is the appropriate sentence for a nonviolent first offender, 75-year-old attorney.

Certainly there can be no argument that Mr. Cantor is 75 years of age. Certainly there can be no argument that Mr. Cantor suffers from a very, very serious series of physical

ailments. As Exhibit A of our sentencing memorandum indicates, the letter from Dr. Rubinstein clearly indicates, without contradiction, that aside from his very serious heart condition, a number of other of his major organs, such as his kidneys, his prostate, have become affected.

Under 5H1.1 of the Sentencing Guidelines, the policy statement indicates clearly, while age is not ordinarily a factor, age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirmed and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

This same principle, your Honor, is repeated in a separate section of the guidelines when we turn to 5H1.4, which reads almost in haec verba: "However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range, e.g., in the case of a seriously infirmed defendant, home detention may be as efficient and less costly than imprisonment."

In this case, the realistic likelihood that Cantor, at age 75, with the infirmities and conditions I have just alluded to and Dr. Rubinstein has spelled out in much greater detail in his letter, the real likelihood, indeed almost the fact, is that Cantor, after almost 50 years of bracing the profession as a lawyer, will lose his right to practice law.

All of the letters that we have submitted and made exhibits to our sentencing memorandum indicate not only from colleagues, not only from members of his firm, but from adversaries, from insurance lawyers, from everybody who has encountered Cantor in the practice of his profession, nothing

but admiration, adulation, respect, and attestation to the fact that he was an excellent lawyer, ethical, trusted, and responsible.

Now, the likelihood of his losing his right to practice is real and immediate. And I say that, your Honor, because we have received, as has Mr. Cantor, a petition from the disciplinary authority with a motion to disbar Mr. Cantor automatically, returnable on October 15, before the Appellate Division, First Department. So that it's not just a question of somewhere in the future this will happen. This will happen very, very immediately, and it raises a question which I don't know whether the guidelines took into consideration.

Recognizing that Mr Cantor is 75, maybe some current wisdom is that maybe he should stop practicing law anyway. But nevertheless the effect is: What does a man 75 years of age who has all these physical impairments do when his profession that he's practiced for over 50 years is taken away from him?

I remember a case, Judge, and I apologize to your Honor, because I don't have the name of it in front of me, but the late Judge Broderick decided a case where a defendant had a business, and as a result of his conviction, he lost his business. And Judge Broderick considered that as a basis for downward departure. And, unfortunately, as I pass on in years, the name of the particular case alludes me and I didn't have the foresight this morning to go back into the office to dig it out. But I represent to you that such a case exists and, if need be, your Honor, I can submit it to the Court.

But it was not only in effect Judge Broderick in his wisdom who recognized the fact that there are collateral

consequences. The United States Supreme Court in Koon v. The United States – and you will hear a lot about it because obviously considering our two respective different positions, Mr. Dember at the first table and me at the second table, we have different views about what the Koon case says.

But nobody can dispute the fact Koon v. United States, 116 Supreme Court 2035, a 1996 case, clearly recognizes that there is a consideration concerning collateral consequences. And Koon case also suggested, and which I call to this Court's attention because I rely on it heavily, that even if an individual factor for downward departure may not exist, a combination of factors may be so compelling and may exist to authorize, permit, indeed induce the Court to downwardly depart.

As Koon case indicates clearly also, they referred to a situation which I would like to refer to, and that is they refer to the heartland under 2H1.4. And we submit to your Honor that this case falls without the heartland of bribery cases under 666, for a variety of reasons, many of which I will not go into because your Honor has kind of alluded to them in making your determination of a two-point downward departure.

But one I would be remiss in not reminding your Honor is that – and I've been doing this for more years than I care to admit – where after a verdict two jurors have found it necessary to communicate, one in public and one with the Court directly, indicating that in retrospect this is not their verdict, they don't think Mr. Cantor is guilty.

I'm not suggesting to your Honor that that warrants setting aside the verdict, I think I know better than that. But

what I'm suggesting to your Honor, most respectfully, to consider is: Does this suggest to us that this case at the very inception was outside the heartland of bribery cases under 666?

An additional aspect that we think takes this case out of the heartland is what we have referred to as the imperfect entrapment. Now, obviously Mr. Cantor did not take the witness stand and we didn't float in the classic sense a defense of entrapment. However, in considering it as a basis for downward departure, the cases – and there are a number of them that I will allude to – clearly indicate that it does exist as a concept.

Not only does it exist, but the courts have utilized it in cases of much greater and much more serious consequence than Mr. Cantor's situation. And it started out interestingly enough in inverse order in this particular district. It started out with a case decided by Judge Sweet, and that case was United States v Giles.

In Giles, which was a money-laundering case which seriousness we certainly can't neglect, it indicated, and Judge Sweet downwardly departed, indicating – and by the way, Giles is reported at 768 F. Supp. 101-103 in the Southern District of New York in 1991 – indicating as one of the strong considerations that there is no prior history on the part of this particular defendant Giles to do money laundering and as a result of it in effect talked about a downward departure in that particular case. And he did it in sort of interesting language, in my judgment, your Honor, if you would just bear with me for a moment.

(Pause)

MR. NEWMAN: He said on page 103, "However, because it evolved, this case is indeed an unusual one. There is no evidence that indicates that Giles had had any prior history of money laundering and the fact that he was on welfare strongly suggests he has not."

Let me digress for a minute and see how it applies in my mind to the case at bar. Clearly Mr. Cantor had practiced construction law for well over 40 years. Clearly he had a respected position in that profession. Clearly, as was indicated by Mr. Walla, he had dealt with Mr. Cantor for over 20 years, with no suggestion of any impropriety on the part of Mr. Cantor.

A more interesting note for me is the fact that Mr. Rosenblum, albeit he was involved in corruption for a long period of time, testified on this witness stand there was no scintilla, no hint, no suggestion, from his testimony or from any question posed to him, that Mr. Cantor in any way prior to that request or initiation on the part of Mr. Rosenblum, that Mr. Cantor had ever engaged in this type of conduct before.

Now, we neglected in our memorandum, and I apprised Mr. Dember of it this morning and I apologize to the Court, to indicate to this Court that in 1991, the determination by Judge Sweet was affirmed in a memorandum opinion in the tables by the Second Circuit, so that the exigent law in the Second Circuit now permits, permits, a downward departure for what we call this imperfect entrapment defense.

The affirmation by the Second Circuit is reported in 953 F.2d 636 (2d Cir. 1991). This policy of recognizing the

imperfect entrapment defense was picked up in the Ninth Circuit initially in a case called United States v. Garza-Juarez, 992 F.2d 896 (9th Cir. 1993). And it's interesting, the Garza-Juarez case was a gun case, certainly a serious case in which a court recognized downward departure for an imperfect entrapment defense.

The Garza-Juarez case was then followed by the Ninth Circuit in a case called United States v. McClelland, and that's reported, if you will, at 72 F.3d 717 (9th Cir. 1995). On page 726 of that decision, the McClelland court emphasizes the legality and, if you will, the bona fides of a downward departure for imperfect entrapment even where in that case the defendant initiated the so-called illegal conduct.

I think it's without contradiction in this case as to how the conduct was initiated in this case. It wasn't by Mr. Cantor; it was by Mr. Rosenblum. And it was clear that Mr. Cantor, in endeavoring to collect what his clients were rightfully entitled to, attempted to follow all of the normal legitimate practices and, if you will – and maybe I'm being overly dramatic, but that's how I view it – he was thrust into the arms of Mr. Rosenblum.

When he wrote his letter, he, Mr. Cantor, was told, The guy you have to talk to is Rosenblum. And indeed Walla sent a copy of the letter to Mr. Cantor in which he indicated that the proper person to deal with was Rosenblum who had already at that point been caught with, to put it mildly, his hands in the cookie jar.

Even in the Giles case where it might be said that the defendant had more to do in initiating it, Judge Sweet and the

Second Circuit recognized the concept of imperfect entrapment as a basis for downward departure.

Certainly here, with Mr. Rosenblum being set up in a position of power, albeit, a convicted – not convicted at that point, but certainly an admitted felon, and placed in that position of power, and Mr. Cantor being thrust into his arms to deal with him in an endeavor to get what was rightfully due to certain of his clients, I think in the light of the cases that we have cited clearly spells out a situation for imperfect entrapment, and therefore another basis for a downward departure.

The factors we have cited both here orally and in greater detail in our sentencing memoranda certainly cry out for a combination of factors as the Koon case indicated, meriting a substantial downward departure.

I know there's a letter from the Bureau of Prisons by a manager – not a doctor, as I read his letter, but a manager – indicating and attesting to the great facilities at the Bureau of Prisons. And I'm not going to get into a debate, but one thing is for sure: Nobody has challenged the last paragraph of Dr. Rubinstein's statement, to the effect that "Mr. Cantor is a troubling patient with multiple symptom abnormalities and potential failures. I think it is quite likely, perhaps greater than 90 percent, that during a period of incarceration the patient would sustain a life-threatening or life-taking myocardial infarction. Kidney dialysis is also a very real possibility."

That can't be refuted and the suggestion by a manager of a Bureau of Prisons that, Don't worry about it, I have the facilities that can take care of this defendant, I'm not going to

argue with it, but I think it should just be given that kind of weight in the face of Dr. Rubinstein's unequivocal statement

Before I close, I would like to just call to the attention of this Court a couple of statements by the United States Supreme Court in Koon v. The United States, which I have previously cited. And I respectfully submit to you that sometimes as advocates – I know I do and perhaps Mr. Dember does from his position – might lose sight of these precepts because of our almost slavish attention to the Sentencing Guidelines.

One of them is contained on page 2044 of the Koon decision as reported in 116 S. Ct. 2035. And that statement reads, in discussing the factors that the Commission lists that should not be considered, the Court, in commenting on that list quotes the commission. And where the commission says that "With the exception of those listed factors, the commission does not intend to limit the kind of factors, whether or not mentioned anywhere else in the guidelines, that could constitute ground for departure in an unusual case," I say to you the case of United States v. Louis Cantor is such an unusual case.

The mere fact that it may not be mentioned or may fall within any guideline, specific guideline, and the combination of circumstances that exist here, permit this Court, in its discretion, to downwardly depart. And I think that precept is further embodied in Koon.

If the Court needed any further support for it, at page 2046 of the same decision, the United States Supreme Court said, "A district court's decision to depart from the guidelines, by contrast, will in most cases be due substantial deference,"

and I would like to highlight in the next phrase what we all sometimes lose sight of because of the guidelines "for it embodies the traditional exercise of discretion by a sentencing court."

This, I submit to the Court, is such an unusual case as indicated on 2044 of the Koon decision, and it's a case in which this Court should exercise its traditional power of discretion as indicated on 2046, by downwardly departing to either afford probation or house arrest in lieu of incarceration, for a person who is 75 years old, suffering clearly from a whole panoply of maladies and who has the background and the record of Louis Cantor.

Thank you, Judge

THE COURT: Thank you, Mr. Newman.

Mr. Dember. Ms. Bloom.

MR. DEMBER: Your Honor, we will simply rely on our letter of October 17.

THE COURT: Fair enough.

Is there any reason why sentence should not be imposed at this time?

MR. NEWMAN: No, your Honor.

MR. DEMBER: No, your Honor.

THE COURT: Quoting the Sentencing Guideline – this will take a minute or two, Mr Cantor. You do not really have to stand if you do not wish.

The same for you, Mr. Newman.

MR. NEWMAN: Thank you, sir.

THE COURT: Quoting Sentencing Guideline Section 5K2.0, which in turn quotes from 18, United States Code, Section 3553(b), the sentencing court may depart from the guideline range if, "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

The guidelines for these offenses, which is Section 2C1.1 of the guidelines, applied to "a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions."

The background discussion in the guidelines at that section refers to such typical bribes as those paid to obtain preferential treatment in the award of a government contract, or issuance of a license to which the recipient is not entitled, or to obstruct justice, or to facilitate the commission of another crime such as bribing a law enforcement officer to allow the smuggling of cocaine.

That approach does not and could not, given what the Sentencing Commission had to accomplish, adequately take into consideration the mitigating circumstances of this case. I

list a few sufficient to justify a departure downward from the guidelines sentencing range:

First, the purposes of the bribes were not to facilitate the commission of a crime or to obtain a license to which the recipient was not entitled. They were to obtain payment of moneys legitimately due to the claimants and long withheld in what one witness described as "a 15-year mess left by the Board of Education for lack of effort in closing out its contract obligations."

Second, the defendant did not pay a penny of the bribes. While he charged his client for his professional services, he did not share in the proceeds obtained by the bribes. His involvement was not out of greed or personal venality. Indeed, it was an anomaly in a lifetime of decent, honorable, and altruistic behavior. His introduction of his clients to Rosenblum, whom he knew had to be paid, was motivated by his conviction that they would not live to see the money they were entitled to unless they paid Rosenblum

Third, the bribery arrangement was not one into which the defendant entered eagerly, as the government argues. On the contrary, he complained that it was wrong, tried to distance himself from it, and was repeatedly told by Rosenblum that there was no workable alternative.

Rosenblum said there was too little money to satisfy all obligations, that only those at the head of the list would be paid, that litigation would be delayed for five or six years, and then appealed, if lost, and that the claimant could work with Rosenblum or fight with the Board of Education.

In view of his client Julius Shulman's advanced age and Mrs. Caristo's situation, 85 years old and running out of funds, those arguments were powerful. Rosenblum understood. He was extorting the bribes. There was testimony he pleaded guilty to extortion. Under New York's penal code, Section 200.5, it is a defense to a bribery prosecution that the corrupt public servant obtained the bribe by means of extortion.

These mitigating circumstances could not have been adequately considered by the Sentencing Commission in formulating its guidelines sentencing range, and they clearly indicate a downward departure. Accordingly, I do not need to advert to Mr. Cantor's age – 75 years – or the state of his health – he has suffered heart attacks, open heart surgery and angioplasty and has prostate and kidney trouble – as grounds for that departure.

On the case as a whole, I am departing downward to level 9, which, at Mr. Cantor's criminal history category of 1, yields a sentencing range of 4 to 10 months. Within that range, I am imposing sentence as follows:

Mr. Cantor, I am placing you on probation for a period of three years on the standard conditions of probation, and the additional special conditions that you undergo five months of home confinement and that you pay to the Treasurer of the United States a fine of $40,000. I also impose the $300 special assessment which is required by 18, United States Code, Section 3013.

Is there any reason why sentence should not be imposed as stated?

MR. DEMBER: No, your Honor.

MR. NEWMAN: No, your Honor.

THE COURT: Sentence is now imposed.

MR. NEWMAN: Your Honor, just one moment.

(Pause)

MR. NEWMAN: Your Honor, as I view the law on fines, Mr. Cantor has his home up for sale, as he indicated in the letter to your Honor. Therefore, under the law, interest would start running on the fine unless your Honor saw fit to allow the fine to be paid over the period of probation.

If he sells his house, he will pay it immediately. But probation can set up a series of payments which will then stop the running of interest on the fine, Judge. And just not to impose an additional financial burden on him, I would ask your Honor to consider Mr. Cantor working out with the probation department a series of payments during the period of probation and the added condition that upon sale of the house he immediately pays whatever balance is due.

THE COURT: Yes, it was my intention that it be paid out of those proceeds and so he can work that out with the probation office. The payments should be completed by the end of his period of probation, in any event.

MR. NEWMAN: Yes. Thank you, sir.

THE COURT: Mr. Dember.

MR. DEMBER: Just for housekeeping purposes, there were two earlier indictments that existed prior to the one that the defendant was tried under, the original indictment and the first superseder. At this time, your Honor, I move to dismiss those indictments.

THE COURT: So ordered.

MR. DEMBER: I would just ask your Honor to remind the defendant he certainly has a right to appeal.

THE COURT: Yes.

You have the right to appeal, Mr. Cantor, and if you wish to appeal, file a notice within ten days. Mr. Newman probably knows how to do that, but if you wish –

MR. NEWMAN: I would like to say I'm undefeated, Judge, but I do know how to do that.

THE COURT: The clerk of the court will do it on your behalf if you wish. If you cannot pay the cost of an appeal, you have the right to ask for leave to appeal without paying the cost.

MR. NEWMAN: Thank you, your Honor. I represent to the Court I will file a notice of appeal for Mr. Cantor.

THE DEFENDANT: May I speak now to thank your Honor.

THE COURT: Thank you, all.

APPENDIX F

UNITED STATES DISTRICT COURT
Southern District of New York

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA

v.

LOUIS CANTOR

Case Number:
S2 94 CR. 465-01 (LLS)

Gustave H. Newman
Defendant's Attorney

AUSAs Susan Jaffe Bloom &
Andrew Dember

THE DEFENDANT:

☐ pleaded guilty to count(s)
☒ was found guilty on count(s) 1, 2, 3, 4, 5 and 6 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	Bribery Conspiracy	4/94	1
18 USC 666 and	Bribery Concerning		

	Programs Receiving	4/94	2
2(a) (b)	Federal Funds	4/94	

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	Bribery Conspiracy	4/94	3
18 USC 666 and	Bribery Concerning		
	Programs Receiving	4/94	4
2(a) (b)	Federal Funds	4/94	
18 USC 371	Bribery Conspiracy	4/94	5
18 USC 666 and	Bribery Concerning		
	Programs Receiving	4/94	6
2(a) (b)	Federal Funds	4/94	

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

xx Original and 1st superceding indictments are dismissed on the motion of the United States.
xx It is ordered that the defendant shall pay a special assessment of $300, for count(s) 1, 2, 3, 4, 5 and 6, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are full paid.

Defendant's Soc. Sec. No: 072-14-0813

Defendant's Date of Birth: 9/17/21 October 22, 1996
Date of Imposition of Sentence

/s/
Signature of Judicial Officer

Defendant's Mailing Address:
14 Cathedral Avenue
Garden City, NY 11530

LOUIS L. STANTON, U.S.D.J.
Name & Title of Judicial Officer

Defendant's Residence Address:
same as above

October 22, 1996
Date

Defendant: LOUIS CANTOR
Case Number: S2 CR. 465-01 (LLS)

The defendant is hereby placed on probation for a term of Three (3) Years.

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation pursuant this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The defendant shall pay a fine 0f $ 40,000. The fine includes any costs of incarceration and/or supervision.

This amount is the total of the fines imposed on individual counts, as follows:

The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

The interest requirement is waived.
The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

- ☐ in full immediately
- ☐ in full no later than _____
- ☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
- ☒ in installments according to schedule of payments: as set forth by Probation Office, payment to be completed by conclusion of Probation term

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: LOUIS CANTOR
Case Number: S2 CR. 465-01 (LLS)

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 14

Criminal History Category: I

Imprisonment Range: 15 to 21 months

Supervised Release Range: ___ to ___ years

Fine Range: $_____ to $_____

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $_____

☐ Full restitution is not ordered for the following reason(s)

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☑ For the following reason(s): mitigating circumstances not considered adequately by Sentencing Committee: *Purpose of bribes was to obtain payments to which payor was legally entitled, defendant neither paid nor shared in benefits of the bribes, and the bribes were extorted by the corrupt official* (italics supplied for handwritten wording)

APPENDIX G

§ 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists–

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof–

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that–

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section–

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department,

independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.